Reserved

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Crl. Appeal No. 1142 of 2001
(Old No. 2188/1983)

1. Puran, S/o Tika Ram
2. Chet Ram, S/o Tika Ram
3. Nanhey, S/o Ram Gopal
   All R/o Village Laxhmipur,
   Patti P.S. Kashipur,
   District Nainital.
4. Praveen, S/o Ram Swarup,
   R/o Village Barahiwala,
   P.S. Kashipur,
   District Nainital. ------ Appellants

Versus

State of U.P. ------ Opposite Party

Mr. D.S. Rawal / Mr. M.S. Pal, learned counsels for the appellants.
Mr. A. Rab, learned Addl. Govt. Advocate for the State.

Date: 27th May, 2004

Hon'ble P.C. Verma, A.C.J.
Hon'ble Rajesh Tandon, J.

(Delivered by Hon'ble Justice Tandon, J.)

The appellants, namely, Puran, Chet Ram, Nanhey and Praveen are aggrieved by judgment and order dated 2nd September, 1983 passed in Sessions' Trial No. 150 of 1982 by Special Judge – Additional Sessions' Judge, Nainital, convicting them under section 302/34 I.P.C. They have been awarded life imprisonment. Therefore, they have come by way of appeal to this Court under section 378(2) of the Criminal Procedure Code.

During the pendency of this appeal, it is reported by the Chief Judicial Magistrate, Udham Singh Nagar that the appellants No. 1 & 4, namely, Puran & Praveen have been died. Now, only the appellants No. 2 & 3, namely, Chet Ram & Nanhey are alive. Therefore, the

appeal on behalf of appellants No. 1 & 4, namely Puran & Praveen, stands abated and is dismissed. Now, we proceed with this case in respect of appellants No. 2 & 3, namely, Chet Ram & Nanhey only.

Case of the Prosecution:

On 28.9.1981 at about 6:30 p.m. Chhote (deceased), his wife Smt. Kamla Devi (PW1) and his son Madhav Singh (PW2) were returning from their tea shop situated near Jaspur Bus Stand. When they reached near the cycle repairing shop of Haji Modh. Usman (PW3) situated in Mohalla Thana Sabiq, P.S. Kashipur all the accused came from the front. Accused Puran & Chet Ram were armed with *Hansias* and Nanhey & Praveen were armed with *Tabbal* and the remaining four accused, namely Ramesh, Ramla alias Ram Lal, Chhote and Karan, who have been acquitted by the learned Addl. Sessions' Judge, Nainital, were holding *lathis*. On seeing Chhote (deceased), accused Puran exhorted the other accused to take revenge against him. Chhote (deceased), then ran towards the shop of Haji Mohd. Usman (PW3) and as soon as he entered the shop, accused Puran, Chet Ram, Nanhey and Praveen also went inside the shop and started giving Hansia and Tabal blows to Chhote (deceased). Other four accused, who have been acquitted stood outside the shop. Smt. Kamla Devi (PW1) and Madhav Singh (PW2) remained outside the shop. When the accused, who had entered the shop, killed Chhote (deceased) they came out the told the accused, who were standing outside that the work has been done and they fled. Smt. Kamla Devi (PW1), wife of the Chhote (deceased) went inside the shop and saw that her husband was murdered by the accused. She then, when to the Police Station Kashipur and lodged the F.I.R. (Ex. Ka. 1) on the same day at about 7.10 p.m. The case was registered at report No. 37 of the General Diary (G.D.) (Ex. Ka. 3). Sub-Inspector A.S. Sharma (PW5), then, went to the place of occurrence and after appointing the witnesses, got the Inquest Report (Ex. Ka. 4) and other connected papers (Ex. Ka. 5 to Ka. 8) prepared on the spot. He, then, sealed the body of Chhote (deceased) and handed it over to Constables Govind

Ballabh (PW6) and Udiya Nand for taking it to the hospital for post mortem. The post-mortem was carried out on 29.9.1981 at about 2.15 p.m. by Dr. R.P. Rastogi (PW4), Medical Superintendent, Civil Hospital, Kashipur.

The post-mortem report (Ex. Ka. 2) revealed the following ante-mortem injuries on the person of the deceased:-

1. Incised wound 5 cm x ½ cm x scalp deep in top of head.
2. Incised wound 6 cm x 1 cm x skin deep on right eye brow and forehead.
3. Contusion 7 cm x 1 cm on right side of neck.
4. Incised wound 8 cm x 2 cm x bone deep right fore-arm 5 cm below wrist cutting both bones, muscles and vassels.
5. Incised wound 4 cm x ½ cm x muscle deep on right middle finger inner side.
6. Incised wound 1 cm x ½ cm x muscle deep right ring finger.
7. Incised wound 4 cm x 2 cm x muscle deep on inner side left fore-arm middle.
8. Incised wound 4 cm x 1 cm x muscle deep on top of left shoulder.
9. Incised wound 4 cm x 1 cm x muscle deep on back and top of right shoulder.
10. Incised wound 5 cm x 2 cm x bone deep on front of right knee.
11. Incised wound 4 cm x 2 cm x muscle deep on front of right ankle.

All the foresaid injuries except injury No. 3 i.e. Contusion 7 cm x 1 cm on right side of neck, have been caused by some sharp-edged weapon. Dr. R.P. Rastogi (PW4) prepared the Post Mortem Report (Ex. Ka. 2) and took one Baniyan, one shirt, on Payjama, one underwear and one Tabij (Ex. Ka. I to V) from the person of the deceased and after sealing them, handed over to the constables, who

had broght the body for post-mortem. In this regard, the statement of Dr. R.P. Rastogi (PW4) is as follows:

> ''सब चोटें क्लीन कट थी अलावा इन्जरी नं0 3 के। इन्जरी नं0 3 के अलावा सब चोटें किसी धारदार हथियार से आई थीं। मेरी राय में छोटे की मौत उन चोटों के कारण सदमा व खून बहने से हुई।''

The investigation in this case was carried out by the Sub-Inspector A.S. Sharma (PW5), who recorded the statements of the witnesses and prepared the site-plan (Ex. Ka. 10) after inspecting the place of occurrence. He also took plain and blood stained earth marked as Ex. VI and VII respectively from the place of occurrence and sealed them in separate containers. He also prepared their memo (Ex. Ka. 9). On 29.9.1981, he arrested accused Karan and Ramla alias Ram Lal and the other accused surrendered before the Court.

After completing the investigation, a charge-sheet (Ex. Ka. 11) was submitted against all the accused. Charges were framed under section 148 and 302/149 I.P.C. against the accused (appellants) namely Puran, Chet Ram, Nanhey and Praveen and under section 147 and 302/149 I.P.C. against the remaining four accused. The charges were read-over and explained to the accused, who pleaded not guilty.

The prosecution examined six witnesses in support of its case, which are as follows:

1. Smt. Kamla Devi (PW1) complainant & widow of the deceased.
2. Madhav Singh (PW2) son of the deceased.
3. Haji Mohd. Usman (PW3) an eye witness of the incident.
4. Dr. R.P. Rastogi (PW4), who had conducted the post mortem.
5. Sub-Inspector A.S. Sharma (PW5), the I.O.
6. Constable Govind Ballabh (PW6), who had taken the dead body to the hospital for post mortem.

Out of these witnesses, the evidence of Dr. R.P. Rastogi (PW4) Sub-Inspector A.S. Sharma (PW5) and Constable Govind Ballabh (PW6) is formal in nature. Smt. Kamla Devi (PW1) and Madhav Singh (PW2) have been declared hostile. Thus, there remained the solitary statement of Haji Mohd. Udman (PW3) regarding the incident and the role played by the accused in the commission of the offence.

Learned Addl. Sessions' Judge, Nainital, after discussing the entire evidence and believing the testimony of eye-witness, namely, Haji Mohd. Usman (PW3), convicted the accused (appellants), namely, Puran, Chet Ram, Nanhey & Praveen under section 302/34 I.P.C. to undergo rigorous imprisonment for life and acquitted the other four accused.

The learned Addl. Sessions' Judge, while convicting the accused (appellants), has also discussed the evidence of Smt. Kamla Devi (PW1) as well as Madhav Singh (PW2), who turned hostile. Learned Addl. Sessions' Judge has recorded a finding that according to Smt. Kamla Devi (PW1) about three months prior to the murder of Chhote (her husband), all the accused had been instrumental in getting Chhote (deceased), Nanhey and Bhurey arrested for the murder of one Pradeep, son of Thakuri, who was the close relative of accused. Chhote (deceased), Nanhey and Bhurey were released on bail. This annoyed the accused. Accused Ramesh & Praveen are the sons of the sister of Thakuri, accused Ramla & Chhote are the brother-in-laws (Bahnoi) of Thakuri, accused Puran, Chet Ram and Thakuri are brothers and accused Nanhey is the nephew of Thakuri. Pradeep, who was murdered prior to the instant incident, was the son of Thakuri and the latter held deceased Chhote guilty of this murder. Therefore, all the relatives of Pradeep i.e. the accused had a strong motive for taking revenge upon the deceased Chhote. Therefore, it is not surprising that when the accused saw the deceased Chhote on the road unarmed, they thought it is a God given opportunity to take revenge and the accused ultimately killed Chhote. When Smt. Kamla Devi (PW1) saw that the accused had succeeded in killing her husband Chhote (deceased), she became afraid of them and the anxiety to save herself and her son

Madhav Singh (PW2) from meeting the same fate, made her change her version of the incident.

The aforesaid fact has completely explained the conduct of Smt. Kamla Devi (PW1) and Madhav Singh (PW2) for turning hostile in order to save the only son Madhav Singh (PW2) and also to save themselves from the clutches of the barbaric act of the accused.

Now, coming to the evidence on record, the FIR (Ex. Ka. 1) was lodged at about 7.10 p.m. and the incident took place at about 6:30 p.m. The distance of the Police Station from the place of occurrence is about two furlong. The FIR (Ex. Ka. 1) also shows the inhumane act of the accused (appellants).

The accused (appellants) were also examined under Section 313 of the Code of Criminal Procedure. Learned Addl. Sessions' Judge has given the complete details with regard to the motive on the part of the accused (appellants) behind the murder. Relevant questions asked in this regard from the accused, namely, Puran Singh (appellant No. 1), are as under:-

1. **सवालः–** सबूत पक्ष का कहना है कि दिनांक 28.9.81 से करीब तीन माह पूर्व प्रदीप पुत्र ठकुरी की लाश काशीपुर में एक कुएं से निकली थी और प्रदीप के कत्ल के मुकदमें में छोटे (मृतक) तथा उसके दो साले भूरे व नन्हे बन्द हुये थे। इस बाबत तुमको क्या कहना है ?

   जवाबः– कुएं से लाश निकली थी लेकिन मैने रिपोर्ट नही लिखाई थी।

2. **सवालः–** सबूत पक्ष का कहना है कि उक्त प्रदीप, तुम्हारा व मुलजिम चेतराम का भतीजा था। इस बाबत तुमको क्या कहना है ?

   जवाबः– यह सच बात है।

3. **सवालः–** सबूत पक्ष का कहना है कि तुम व मुलजिम चेतराम आपस में सगे भाई हो। मुलजिम प्रवीन तथा मुलजिम रमेश तुम्हारे भान्जे है। मुलजिम नन्हे तुम्हारा भतीजा है, मुलजिम छोटे तथा मुलजिम रमला तुम्हारे बहनोई है, तथा मुलजिम करन तुम्हारे भाई ठकुरी का साला है। इस बाबत तुमको क्या कहना है ?

जवाबः– यह सच है।

Similarly, Chet Ram (appellant No.2) also replied the question in the same manner. Relevant questions asked to him under Section 313 of the Code of Criminal Procedure are also quoted below:

1. **सवालः–** सबूत पक्ष का कहना है कि दिनांक 28.9.91 से करीब तीन माह पूर्व प्रदीप पुत्र ठकुरी की लाश काशीपुर में एक कुएं से निकली थी और प्रदीप के कत्ल के मुकदमे में छोटे (मृतक) तथा उसके दो साले भूरे व नन्हे बन्द हुये थे। इस बाबत तुमको क्या कहना है ?

   जवाबः– लाश कुएं से निकली थी। बाकी बात मालूम नही है।

2. **सवालः–** सबूत पक्ष का कहना है कि उक्त प्रदीप, मुलजिम पूरन व तुम्हारा भतीजा था। इस बाबत तुमको क्या कहना है ?

   जवाबः– यह सच है।

3. **सवालः–** सबूत पक्ष का कहना है कि मुलजिम पूरन व तुम आपस में सगे भाई हो। मुलजिम प्रवीन तथा मुलजिम रमेश मुलजिम पूरन के भान्जे हैं। मुलजिम नन्हे मुलजिम पूरन का भतीजा है, मुलजिम छोटे तथा मुलजिम रमला मुलजिम पूरन के बहनोई है, तथा मुलजिम करन मुलजिम पूरन का भाई ठकुरी का साला है। इस बाबत तुमको क्या कहना है ?

   जवाबः– यह सच है।

Similarly, the other two accused (appellant), namely, Praveen and Nanhey also gave the same reply to questions No. 2 & 3. Although, for question No. 1, the replied that they did not know.

FINDINGS

Learned counsel for the appellants has argued that there are two shops of Hazi Mohd. Usman (PW3) and therefore, he disputed regarding the place of occurrence.

We do not find any merit in this argument as Hazi Mohd. Usman (PW3) has clearly stated that he is running only one shop as will appear from his statement, which is quoted below:

''मौके पर मेरी दो दुकान है लेकिन मैं एक दुकान ही चलाता हूॅ। दूसरी दुकान मैने 2–3 महीने पहले भूसे वाले को किराये पर दी है। यह घटना पूर्व स्थित दुकान पर हुई।''

Learned counsel for the appellants, further, argued that the statement of Hazi Mohd. Usman (PW3) is doubtful as he is a police witness when in point of fact, he has frankly stated that he has not given any evidence on behalf of the Police and he has not been a police wintess at all.

In this regard, his statement is as quoted below:-

''मैने पुलिस की आज तक कोई गवाही नही दी। मैने गवाही ही आज अदालत में पहली बार दी है। यह गलत है कि पुलिस के 8–9 मुकदमों मे गवाही दे चुका हूॅ।''

It is further argued by the learned counsel for the appellants that Smt. Kamla Devi (PW1) and Madhav Singh (PW2) have already been declared hostile and therefore, the appellants cannot be sentenced on account of this fact.

In this regard, the reasons for getting hostile of Smt. Kamla Devi (PW1) and Madhav Singh (PW2) have already been mentioned above as discussed by learned Addl. Sessions' Judge. The reason for their turning hostile is to save themselves from the clutches of the barbaric act of the accused. With regard to the incident, Smt. Kamla Devi (PW1) has clearly stated in her statement, which is quoted below:

''मैं मुलजिमान हाजिर अदालत पूरन–परवीन–चेत राम–नन्हे–रमेश–करन–रमला व छोटे हाजिर अदालत को घटना के पहले से जानती हूॅ। मुलजिमान आपस में रिश्तेदार हैं। पूरन व चेत राम आपस में भाई भाई हैं। इनका तीसरा भाई ठकुरी है। नन्हे, ठकुरी का भतीजा है। परवीन ठकुरी का भान्जा है। रमला व छोटे ठकुरी के बहनोई हैं। रमेश भी ठकुरी का भान्जा है। करन ठकुरी का साला है।

घटना 1 साल 1 1/2 माह पहले की है। इस घटना से 3 माह पहले इन मुलजिमान ने मेरे पति छोटे व मेरे भाई नन्हे व भूरे को प्रदीप के कत्ल के मुकदमे में फंसा दिया था। प्रदीप ठकुरी का लड़का था। मेरे भाई व पति जमानत पर छूट कर आ गये थे।''

Learned counsel for the appellants next argued that there is a clear violation of Section 157 of the Code of Criminal Procedure.

It was a case where brutal murder has taken place. The evidence of Hazi Mohd. Usman (PW3), who is an eye-witness of the incident, fully corroborates the occurrence, the place, time and circumstances of the incident. Further, the statement of Smt. Kamla Devi (PW1) has been fully discussed by the learned Addl. Sessions' Judge and the nature of her evidence shows that she was frightened on account of barbaric act of the accused. Therefore, Section 157 of the Code of Criminal Procedure is not attracted in this case. Moreover, this question was never raised and asked from the Investigating Officer. At no point of time, this point was ever raised either in the statement under Section 313 or in cross-examination. However, any illegality or irregularity of the information does not affect the jurisdiction of the police officer to investigate or the exercise thereof by the police officer under this Section. Even if the first information report suffers from an infirmity of not containing factual allegations constituting a cognizable offence, that would not debar a criminal investigation altogether. It cannot hamper the trial in any way looking to the brutal murder.

Delay in despatch of First Information Report of Magistrate is not a circumstantial, which can throw out the prosecution case in its entirety. In the circumstances, there is no merit in the above argument advanced on behalf of the appellants.

With regard to the motive behind the crime, in the case of Jogi & another Vs. State of U.P. reported in 2003(47)ACC 534, the Hon'ble Allahabad High Court has held as under:

> *"There was strong motive on the part of the accused-appellants to commit this crime. Their solicitation soaked in lewdness had been spurned earlier by the young girl who had even chided and abused them for their advances. It is there in the evidence of Kanhaiya PW3 (brother of the deceased) that his father was comparatively a poor person whereas the accused-appellants were better placed. Hari Lal PW1 (father*

of the deceased) deposed that his daughter had complained to him ten or twelve days before the incident about the lascivious overtures of accused-appellants and he himself had reprimanded them on finding them loafing around his house. It is obvious that they took the insulted deep inside and the young girl had to pay the price of her ideal standard of morality by losing her life as she had declined to fall prey to their lustful advances. Though Hari Lal PW1 himself is not an eye-witness, but his testimony is very relevant in unfolding the previous background and motive of the accused-appellants for committing this crime. He had reached the spot on the information given by his son Kanhaiya PW3. He was returning from school and it was on his information that Hari Lal had rushed to the place of occurrence to find his daughter lying dead. Jayanti Tewari PW2 is a witness of fact. Giving plausible explanation for his presence at the spot, he stated that in the morning of the day of occurrence he had gone to the house of his maternal uncle and was returning by bicycle to his village. At 4.30 P.M. Kanhaiya PW3 was raising alarm that his sister was being assaulted by the accused appellants. He along with Vasishatha Tewari and Chetan rushed to the scene of occurrence and saw the happening. It is also in his evidence that the accused-appellants then ran away. Nothing could be elicited from his cross-examination to discredit his testimony. There was no reason either for his deposing falsely against the accused-appellant.

Kanhaiya Lal PW3 was a lad of about 12 years and could not be expected to closely follow the accused-appellants when they were actually killing his sister in the Arhar field. He informed of it to Jayanti Teewari PW2 who was passing by that way and he (Jayanti Tewari) actually witnessed the real incident while he (Kankaiya PW3) rushed to inform his father. Nothing more could be expected from a boy aged about 12 years.

It also appears that the accused – appellants tried everything to make a dent in the prosecution case and then even paid money to Kanhaiya Lal PW3 as admitted by him in his cross-examination by State Counsel. His statement was recorded in the Court on 31.8.1980. Earlier thereto, he had come to the Court on three dates, but his evidence was not recorded. It is apparent that accused-appellants were attempting to nullify the serous legal repercussions of this heinous crime committed by them and to come out of the difficult situation, they even bribed Kanhaiya Lal PW3, a poor person qua their affluence. It is likely that poverty of his father was conducive factor which provided a foot board to the accused-appellants to bribe him (Kankaiya PW3).

But despite every misadventure of the accused-appellants, the reality could not be subdued and justice would triumph because testimony of eye witness Jayanti Tewari PW2 is of sterling character leaving not even slightest doubt that it were the accused-appellants who committed this heinous crime. The facts emerging from the testimony of Hari Lal PW1 as also from that of Kanhaiya Lal PW3 (child witness) – brother of the deceased (though declared hostile by the prosecution) clinchingly bring home the guilt to the accused-appellants. Even on being declared hostile, the statement of Kanhaiya PW3 goes a long way in supporting the prosecution case. It cannot at all be questioned that he was on the way to his house from his school at about 4.30 P.M. when his sister was murdered in the Arhar field. It was on his information that Jayanti Tewari PW2, passing that way, had immediately rushed to the spot to witness the actual incident. Indeed, the statement of Kanhaiya PW3 is supportive of the prosecution case in a great deal."

Under the above circumstances, the substantive charges under section 302/34 I.P.C. is proved beyond reasonable doubt against the appellant. We do not find any infirmity or illegality in the judgment

and order dated 2nd September, 1983 passed in Sessions' Trial No. 150 of 1982 by Special Judge – Additional Sessions' Judge, Nainital.

Accordingly, we pass the following Order:

ORDER

Appeal stands dismissed.

The conviction and sentence of life imprisonment on Chet Ram and Nanhey, appellants No. 2 & 3 herein, for offence punishable under section 302/34 I.P.C. is upheld.

Let copy of this judgment and order along with the record of the case be sent to the Court below for compliance. It will submit the compliance report within two months from the date of the receipt of the record.

(Rajesh Tandon, J.) **(P.C. Verma, A.C.J.)**

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